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**From:** Kupchan, Simma [Kupchan.Simma@epa.gov]  
**Sent:** 6/17/2020 1:31:12 PM  
**To:** Neugeboren, Steven [Neugeboren.Steven@epa.gov]; Wehling, Carrie [Wehling.Carrie@epa.gov]  
**CC:** Wade, Alexis [Wade.Alexis@epa.gov]; Siegal, Tod [Siegal.Tod@epa.gov]; Marshall, Tom [marshall.tom@epa.gov]  
**Subject:** FW: NHPA Example  
**Attachments:** NPDES.Maine.ACHPReferral.pdf

Just a heads up that R4 found some of the documentation of our NHPA consultation process, and its outcome, in Maine, and may give a quick, high-level summary of how that process resolved itself when we meet with Dave later today.

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**From:** Hicks, Matt <Hicks.Matthew@epa.gov>  
**Sent:** Wednesday, June 17, 2020 8:37 AM  
**To:** Kupchan, Simma <Kupchan.Simma@epa.gov>; Siegal, Tod <Siegal.Tod@epa.gov>; Nagrani, Kavita <Nagrani.Kavita@epa.gov>  
**Subject:** NHPA Example

Simma, Tod, and Kavita:

Leif found this "No Adverse Effect" letter from 2003 that EPA Region 1 sent to the ACHP regarding an NHPA 106 consultation EPA did on their review of Maine's application to administer the NPDES program. The letter discusses issues that may arise should we decide to do 106 consultation on FL's 404 assumption package. It's pretty dense so I've attempted to summarize it for you below.

As you'll see, the Tribe argued that impacts of future permits issued by Maine on cultural and historic resources couldn't be fully anticipated during program approval and that a programmatic agreement, instead of Region 1's proposed MOA, would be an appropriate resolution. It sounds like the ACHP agreed with the Tribe. My main question is why the Tribe and ACHP concluded that a programmatic agreement, instead of an MOA, addressed the Tribe's concerns (i.e., it doesn't seem that an agency can fully anticipate impacts to cultural/historic resources from issuance of future permits regardless of what agreement you go with). It appears that there was an extensive record associated with this action (not included here) that may hold some answers.

Thanks,

Matt

Summary:

Maine was seeking to administer the NPDES program for areas both outside and within Indian territories. Region 1 took the position that approval of a state program was an undertaking and that 106 consultation was necessary but that approval itself would have no effect on historic resources in Maine.

For administration of the NPDES program outside of Indian territory, the SHPO agreed that there would be no adverse effects on the condition that the Maine DEP agree to provide the SHPO with notice and certain relevant information for subsequent permitting actions. The agreement between Maine DEP and SHPO was memorialized through a MOU.

For administration of the NPDES program inside of Indian territory, Region 1 attempted to negotiate a MOA with the state Tribes whereby Region 1 would exercise its CWA oversight authority of Maine's NPDES program to help ensure appropriate consideration of Tribal views regarding the effect, if any, of state permitting actions on historic properties of interest to the Tribes. This would include providing the Tribes with notice of state permit applications involving discharges of concern to the Tribes and objecting to state permits in order to address Tribal concerns regarding historic properties where the Agency finds that the permit is inconsistent with the CWA. After negotiations regarding the MOA reached an impasse, Region 1 issued its No Adverse Effect determination. One of the Tribes disagreed with the determination arguing that impacts of future permits issued by Maine on properties of cultural and historic interest to the Tribe cannot be fully anticipated and that a programmatic agreement would be an appropriate resolution. Footnote 5 of the letter says that the ACHP agreed that it wasn't possible during program approval to determine that administration of the NPDES program by Maine would not adversely affect historic properties and that the ACHP and the preamble to the NHPA 106 regulations at 68 Fed Reg 55354, 55355, suggest that a programmatic agreement would be appropriate.

Ultimately, Region 1 argued (without much support) that a programmatic agreement wasn't necessary, that the draft MOA it attempted to negotiate with the Tribes was sufficient, and that historic properties of interest to the Tribes would not be adversely affected by approving Maine's NPDES program application.